solicitor in the conduct of his professional work the court may, in a proper case, order him to be personally liable for the costs of the proceedings after giving him an opportunity to defend himself;

(2) in this case, having come to a conclusion that the civil suit filed by the plaintiff was "conspicuously unmaintainable" and having rejected the explanation given by the advocate and solicitor for the plaintiff, the learned judge ought to have exercised his discretion and ordered that the costs of the proceedings be paid by the lawyer personally.

Cases referred to:

(1) *Myers* v. *Elman* [1940] A.C. 282.
(2) *Edwards* v. *Edwards* [1958] P. 235.
(3) *Mitra & Co.* v. *Thevar & Anor.* [1960] M.L.J. 79.

SUPREME COURT.

Karpal Singh, appellant, in person.

Karam Singh for the respondent.

Seah S.C.J. (delivering the Judgment of the Court) : The first thing to remember is that an advocate and solicitor is an officer of the court and that his professional conduct is always under the supervision and scrutiny of the court. It follows that when there is dereliction of duty on the part of an advocate and solicitor in the conduct of his professional work the court may, in a proper case, order him to be personally liable for the costs of the proceedings after giving him an opportunity to defend himself.

In the High Court below, after the learned judge had struck out the civil suit, Karpal Singh (2nd defendant), appearing in person applied for the costs of the action to be borne by Karam Singh, learned counsel for the plaintiff, personally. The learned judge declined to make such an order. On appeal, Karpal Singh argued that the learned judge had failed to exercise his discretion judicially. It was submitted that after finding the civil suit brought by the plaintiff to be "conspicuously unmaintainable" and in the absence of any explanation given by Karam Singh, the learned judge should have acceded to the application. We think the learned judge had misconstrued the principle laid down by the House of Lords in *Myers* v. *Elman*(1) explained by Sachs J. in *Edwards* v. *Edwards*(2) and followed by the then Court of Appeal in the case of *Mitra & Co.* v. *Thevar & Anor.*(3) In our opinion, having come to the conclusion that the civil suit filed by the plaintiff was "conspicuously unmaintainable" and having rejected the explanation given by Karam Singh, we think that this was a proper case where the learned judge ought to have exercised his discretion and ordered that the costs of the proceedings be paid by Karam Singh, the lawyer, personally. We therefore allow the appeal and amend the order of the learned judge by adding the words that "Karam Singh, do repay to the plaintiff, costs which the plaintiff has been ordered to pay to Karpal Singh, the 2nd defendant, under Order 59 rule 8(2) (b) of the Rules of the High Court, 1980." Costs of the appeal to the appellant to be paid by Karam Singh personally. Deposit to be refunded to the appellant.

Appeal allowed.

Solicitors: *Karpal Singh & Co.; Karam Singh Veriah & Co.*

KRISHNAN v. PUBLIC PROSECUTOR

[S.C. (Wan Suleiman, Seah & Wan Hamzah S.C.JJ.) June 24 & October 3, 1986]

[Kuala Lumpur – Supreme Court Criminal Appeal No. 42 of 1984]

Criminal Law and Procedure – Charge of trafficking in dangerous drug – Second charge of cultivating cannabis plants – Application to have second charge stayed during trial – Wrongful admission of evidence relating to second charge – Statement of accused without caution being administered to him – Inadmissible evidence admitted in reliance on s. 27, Evidence Act – Conviction set aside – Evidence Act, 1950, ss. 27 & 167 – Criminal Procedure Code (F.M.S. Cap. 6), s. 113 – Dangerous Drugs Act, 1952, ss. 6B & 39B.

Evidence – Evidence wrongly admitted under s. 27, Evidence Act – Effect of wrongful admission – Evidence Act, 1950, ss. 27 & 167.

Criminal Justice – Evidence – Proof of guilt – Equal protection of law.

In this case the appellant had been charged on two charges, the first of trafficking in a dangerous drug, to wit cannabis, and the second of cultivating cannabis plants. After the evidence of the investigating officer was given in relation to both the charges, the learned Deputy Public Prosecutor applied to have the second charge stayed. The proceedings then continued on the first charge only in which the appellant was subsequently found guilty and convicted. The appellant appealed. On the appeal it was argued that the evidence of the cultivation of ganja was wrongly admitted in relation to the first charge. Such evidence was inadmissible, irrelevant and prejudicial and this occasioned a miscarriage of justice. It also appeared that the statement of the accused, not under caution was wrongly admitted in evidence and that the statement contained evidence which was not admissible under section 27 of the Evidence Act.

Held: (1) in this case not only was evidence of crucial admissions to the Investigating Officer by the appellant, pertinent to the charge which was stayed introduced and admitted in evidence, but admissions relating to the offence therein alleged were allowed to remain in the cautioned statement made by the appellant which the learned trial judge admitted in evidence;

(2) the statement of the accused to the investigation officer was wrongly admitted in evidence as the accused had then been arrested and no caution had been administered to him;

(3) the statement contained evidence not admissible under section 27 of the Evidence Act, as it included more than information which distinctly relates to the facts discovered;

(4) in the circumstances the conviction should be quashed and the sentence set aside.

Cases referred to:

(1) *Poon Soh Har* v. *Public Prosecutor* [1977] 2 M.L.J. 126.
(2) *Makin* v. *Attorney-General for New South Wales* [1894] A.C. 57.
(3) *Tan Hung Song* v. *Rex* [1951] M.L.J. 181.
(4) *Pulukuri Kotayya* v. *King Emperor* L.R. 74 I.A. 65.

SUPREME COURT.

Suppiah Ramasamy for the appellant.
Gooi Soon Seng (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Wan Suleiman S.C.J. (delivering the Judgment of the Court) : The appellant faced two charges in the Court below, the first charge being

"That you on 3.11.1983 at about 3.20 pm., at house No. 13H, 10th. Milestone, Kepis, Dangi, in the District of Kuala Pilah, in the Sate of Negeri Sembilan, on your own behalf, did traffic in a dangerous drugs, to wit, cannabis weighing 292.90 grammes, in contravention of the provisions of section 39D (1) (a) of the Dangerous Act 1952 (Law of Malaysia Act 234), and thereby committed an offence punishable under section 39B (2) of the said Act."

and the second

"That you on 3.11.1983 at about 3.20 pm., behind your house at 10th. Milestone, Kepis, Dangi, in the District of Kuala Pilah, in the State of Negeri Sembilan, on your own behalf, did cultivate four cannabis plants from which raw cannabis may be obtained directly without the authorisation of the Minister charged with the responsibility for Medical and Health services in contravention of the provisions of section 6B (1) (a) of the Dangerous Drugs Act 1952 and thereby committed an offence punishable under section 6B(3) of the said Act."

The officer who was Investigating Officer and who led the raid in which appellant was arrested then testified. At the close of his testimony the learned Deputy, for reasons not disclosed, applied to have the 2nd charge stayed. There was no objection from the defence counsel and proceedings then continued on the first charge only on which appellant was subsequently found guilty and convicted, whereupon on the application of the learned Deputy the second charge was withdrawn and the appellant discharged on the second charge.

From the staying of the second charge arose the first main ground of appeal.

Mr. Suppiah for the appellant contends that evidence of cultivation of ganja is inadmissible, irrelevant and prejudicial and that this has occasioned a miscarriage of justice.

He also objected to the reference in the judgment that appellant was an addict. Whilst it would be inaccurate to suggest that there was no evidence to that effect, but the only mention of it was made in the cautioned statement of which we will have more to say about in due course.

A passage in the Investigating Officer's testimony at page 10 of the Appeal Record was specified by Mr. Suppiah. This relates to what the appellant had done and said in response to the Investigating Officer's questions after ganja, the subject of the first charge, had been found in one of the two houses, allegedly occupied by him and his family:-

"I asked Krishnan whether he had any more ganja. He said yes and by pointing to the back of the house. I asked him if he could take me to the place. He said he could. Then he brought me to a small plantation. I asked him where was the thing and he answered, that it was there, by pointing to the plants of ganja, planted between vegetables. I asked him if he had any more. He did not say anything but he pointed to the direction of one container suspected of containing seedlings of the ganja. Then, beside the container, I found seeds suspected to be seeds of ganja."

We should perhaps mention that these questions and answers were made without any caution being administered under section 113 (1) of the Criminal Procedure Code, nor was any caution administered soon after the statement had been made under the circumstances envisaged under proviso (b) to that subsection.

Whilst such evidence may well be admissible under section 27 of the Evidence Act on the second charge, it would without question be inadmissible where only the first charge is proceeded with.

As one would expect, the cautioned statement, recorded with both charges in mind contained reference to the same objectionable items, and not surpisingly the judgment took into account such evidence (see pages 90/91 and page 98).

We were referred to the decision in *Poon Soh Har* v. *Public Prosecutor*[1] which relied on the *locus classicus* on this point in the Privy Council decision in *Makin* v. *The A.G. for New South Wales*[2] in which it was held that it is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. Their Lordships went on to say that the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it is relevant to an issue before a jury, and it may be relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment are designed or accidental, or to rebut a defence which would otherwise be open to the accused.

We need hardly say that the same principle should apply where the judge was as in this case, sitting alone, and we have not lost sight of the words of caution that whilst the principles are easy to state it is often difficult to draw the line and decide whether a particular item of evidence is on the one side or the other.

There is no question that the evidence complained of was to negative any defence that the offence of possession of dangerous drugs was designed or accidental. It might appear from the reply of the learned Deputy that the Public Prosecutor's consent being for the first charge only, application had therefore been made to stay the second charge so that evidence of events relevant to the second charge (which had been stayed) had been introduced inadvertently, and to compound this act of negligence, the same evidence was introduced a second time in the cautioned statement made by the appellant. Whether the evidence complained of had been intentionally introduced must be a matter for conjecture.

The learned Deputy in his reply to Mr. Suppiah conceded that since consent for the prosecution by the Public Prosecutor had been given only in respect of the first charge, he had asked for the stay of the second. Incidentally, no consent is needed for a prosecution of an offence under section 6B (1) (a) of the Act, the section on which the second charge was based.

However not only was evidence of crucial admissions to the Investigating Officer by the appellant, pertinent to the charge which was stayed introduced and admitted in evidence, but admissions relating to the offence therein alleged were allowed to remain in the cautioned statement made by appellant, which the learned trial Judge admitted in evidence.

It would therefore be fair to proceed on the assumption that such evidence had been intentionally introduced by the prosecution bearing in mind that, as counsel for appellant indicated, the stay had been applied for and granted *after* the objectionable evidence had been adduced.

There are other disturbing factors about such evidence, unfortunately not taken up before us but which is incumbent upon us to consider.

Firstly it will be useful to set out in extenso that part of appellant's statement as related by the Investigating Officer (at page 10/11 of the Record):-

"On arrival, I saw one male Indian standing in front of the house. When he saw me, he ran into the house. I gave chase into the house and introduced myself as a police officer. I went to the house, because I received information in respect of dadah. I chased him, he was behaving suspiciously. After introducing myself, I asked for his identity card and found his name to be Krishnan s/o Ramar (accused is identified as the person). I then started searching the house. The bed room in the rear, under a wooden platform, I found 237 packets of suspected ganja. After that I directed photographer to take photographs of the place *i.e.* the spot where the suspected ganja was recovered. I asked Krishnan whether he had any more ganja. He said yes and by pointing to the back of the house. I asked him if he could take me to the place. He said he could. Then he brought me to a small plantation. I asked him where was the thing and he answered, that it was there, by pointing to the plants of ganja, planted between vegetables. I asked him if he had any more. He did not say anything but he pointed to the direction of one container suspected of containing seedlings of the ganja. Then, beside the container, I found seeds suspected to be seeds of ganja. When he pointed to me the plants of ganja, I directed photographer to take photographs. When the accused pointed to the container, I also directed the photographer to take photographs of the seedlings found. After that I directed the photographer to take photograph of the ganja plants. The container containing seedlings and also the said seeds. I arrested the accused and with the things found I brought to the pondok polis at Kepis."

We are satisfied that the arrest had taken place earlier, when that witness had pursued appellant

into his house and asked to search it. That brings the requirement of section 113 (1) (a) (ii) of the Criminal Procedure Code, which requires the administration of the cautionary words before his statement would become admissible, into play.

No such cautionary admonition was administered, and this is not an instance where the statement complained of was blurted out before there was time to administer the caution. The cautioned statement is therefore inadmissible.

A second hurdle, in our view would be section 27 of the Evidence Act, which for ease of reference, is set out hereunder:-

"When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of the police, so much of such information, whether such information amounts to a confession or not, as relates to the facts thereby discovered, may be proved."

As was said in *Tan Hung Song* v. *Rex*[3] it allows so much of the information as distinctly relates to the facts discovered to be admissible in evidence.

Section 27 of the Evidence Act is not intended to let in a confession generally and not one word more of the information which the accused supplied should be given in evidence than is strictly necessary to show how the fact which was discovered is connected with the accused so as in itself to be a relevant fact against him.

That inadmissible and highly prejudicial evidence was let in which would have inadmissible and prejudicial even had the second charge (for cultivation) been proceeded with is abundantly clear from the evidence of the Investigating Officer which has been set out earlier.

The passage in the Privy Council decision in *Pulukuri Kotayya* v. *King Emperor*[4] cited in *Tan Hung Song* amply illustrates the danger of letting in too much under section 27 of the Evidence Act:-

"Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A', these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

Therefore we have here a situation where evidence have been admitted which should not have been admitted and the duty of this Court in such circumstances is set out in section 167 of the Evidence Act which reads as follows:-

"167. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision."

After discarding the evidence improperly admitted, is there sufficient left to justify the conviction?

We would refer to that portion of the learned trial judge's judgment which foreshadowed what he might have done had the cautioned statement alone been excluded:

"I ought to mention also that had the cautioned statement of the accused in this case been excluded from the evidence, the evidence without the cautioned statement might or might not possibly have led to a benefit of doubt being accorded to the accused, but it was not necessary to decide such a hypothetical position as the Court was of the view also that only some evidence of material circumstances extraneous to the cautioned statement would be sufficient for the purpose of corroborating the confession contained in the cautioned statement, and that such corroborative evidence so used, need not, by itself, have inevitably established a case beyond a reasonable doubt against the accused or otherwise justified a conviction. Please see again the case of *R.* v. *Baskerville (supra)*. Were it otherwise, the cautioned statement would of course have been supererogatory for the purpose of the conviction in this case. If such evidence, minus the cautioned statement was by itself sufficient to justify such a conviction, then such evidence together with the cautioned statement would have the effect of making this case even more formidable or unassailable."

Add to such uncertainty the other item of evidence wrongly admitted under section 27 of the Evidence Act, the likely result, in our mind, would have been that the defence would never have been called.

It is one of the most basic rules of justice that however heinous a crime a person is accused of, whatever the rank of the person who testifies against him, he can only be convicted on evidence produced according to the stringent requirements of the law. It cannot be questioned that the offence of trafficking is a very serious one, the gravity of which is reflected in the sentence, in this case the sentence of death. But it does not mean that a person accused of one of the most serious crimes known to our law is not entitled to equal protection before the law and one of those items of

protection to which he is entitled is that his guilt must be proved in accordance with or in a manner required by law. Anything less will not be enough.

After careful consideration we rule that the proper course would be to quash the conviction and set aside the sentence.

We have considered and rejected ordering a retrial since it would be most unjust in the circumstances to put him in jeopardy of his life twice.

The appellant is accordingly acquitted and discharged.

Appeal allowed.

Solicitors: *Ramasamy Suppiah & Co.*

SUPREME FINANCE (M) BHD. v. KOO SIN KEN

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Syed Agil Barakbah S.C.JJ.) October 15, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 101 of 1986]

Practice and Procedure – Rate of interest after date of judgment – R.H.C. 1980, O.42 r. 12.

In this case the respondent the director of a company had charged a piece of land to the appellant as security for a loan to the company. The respondent was to pay the appellant interest at the rate of 18% per annum. It was also agreed that in default of payment of the loan or interest the appellant should be entitled to agreed damages at the rate of 0.685% per day on the sum owing from the date of default until the date of payment. The respondent failed to pay interest for the months of December 1982 to April 1983. The appellant sent the statutory notice under the National Land Code and the respondent was ordered to show cause why his land should not be sold by public auction for the recovery of the amount due that is $416,633.28 being the principal sum including interest at the rate of 18% per annum as at April 30, 1983 together with further interest at 0.685% per day until December 5, 1983 and thereafter at 8% until the date of full satisfaction. The appellants appealed and contended that they were entitled to the interest of 18% until the date of realization.

Held: the appellants are entitled to retain their security until they are paid the principal sum and specified rates of interest up to the date of judgment but they were not entitled to interest on the judgment debt exceeding the statutory rate of 8% per annum under Order 42 rule 12 of the Rules of the High Court, 1980.

Cases referred to:

(1) *American International Assurance Co. Ltd.* v. *Union Builders (Malaysia) Sdn. Bhd.* [1973] 1 M.L.J. 95.
(2) *Ex parte Fewings* (1884) 25 Ch. D. 338, 355.
(3) *Economic Life Assurance Society* v. *Usborne* [1902] A.C. 147, 149.
(4) *Public Bank Berhad* v. *Hara Industries Sdn. Bhd. & Anor.* K.L. Civil Suit No. 7652 of 1985.
(5) *Sim Lim Finance Ltd.* v. *Pelandok Enterprises Pte. Ltd. & Anor.* [1981] 1 M.L.J. 280.

SUPREME COURT.

Loh Siew Cheang for the appellant.
Loh Yew Dong for the respondent.

Lee Hun Hoe C.J. (Borneo) (delivering the Judgment of the Court) : We dismissed the appeal and stated we would give our reasons later. We do so now.

The only issue in the appeal concerned the rate of interest to be given after date of judgment. The facts were not in dispute. Briefly, Macina Enterprise Sdn. Bhd. (the borrower) obtained a loan of $392,000.00 from the appellant. As security for the loan the respondent, a director of the borrower, charged to the appellant a piece of land described as C.T. No. 9408 Lot No. 78-N in the Town of Ipoh (the land). The respondent was to pay the appellant interest on the loan at the rate of 18% per annum. It was also provided that in default of the loan or interest the appellant should be entitled to agreed damages at the rate of 0.685% per day on the sum owing from the date of default until the date of payment. The respondent failed to pay interest for the months of December 1982 to April, 1983. Notice recalling the loan was given to the respondent. On June 29, 1983 the appellant sent the respondent the statutory notice in Form 16E pursuant to section 255 of the National Land Code. As on April 30, 1983 the total amount (including interest) outstanding was $416,653.78. Consequently, the respondent was ordered to show cause why his land should not be sold by public auction for the recovery of the amount due, that is, $416,633.28 being the principal sum including interest at the rate of 18% per annum as at April 30, 1983 together with further interest at 0.685% per day until December 5, 1983 and thereafter at 8% per annum until the date of full satisfaction.

In his grounds of judgment the learned Judge stated:-

"The defendant claims that the interest as provided for by the agreement at 18% per annum should only be chargeable